in the

Supreme Court

of the

United States

OCTOBER TERM, 1970

No. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and THE FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

PETITION FOR REHEARING OF APPELLEE, THE FIRESTONE TIRE AND RUBBER COMPANY

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Appellee, The Firestone Tire and Rubber Company (hereafter, "Firestone"), pursuant to the provisions of Rule 58, *Supreme Court Rules*, respectfully petitions for rehearing of the decision herein rendered on June 12, 1972. (All emphasis herein is supplied, unless otherwise noted.) Firestone petitions for rehearing before the full complement of nine Justices of this Court. Firestone has a number of

grounds for rehearing, but perhaps the most important arises from the fact that this case and its companion[1] were argued to and thus decided by seven members of the Court.

This Court unquestionably has the power to strike down, by decision of a single case, the legislative enactments of Congress and all the states. Certainly that is the effect of this case, since virtually all states and the District of Columbia have (or had) pre-judgment replevin procedures.[2] If 49 legislatures are to be overruled, however, it seems only proper that the judgment be that of the *majority of nine* Justices of this Court. The fortuitous, or unfortuitous, circumstance of argument calendaring should not determine whether a long-standing and widespread business practice stands or falls, and centuries of statute law abrogated.

Four members of the Court to whom the case was submitted hold the opinion that the Florida pre-judgment replevin procedure denies procedural due process; but three members of the Court are of contrary opinion. If the two non-participating Justices were to agree with the present minority, the law of the land and the meaning of our Constitution would be different in a deeply significant way. Petition is therefore made for resubmission of this cause to the nine Justices who are constitutionally directed, though not required, to decide issues like those presented here. The pre-judgment replevin procedure has been in

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[1] *Parham v. Cortese*, No. 70-5138. These cases were orally argued before and considered by only seven Justices of this Court (Justices Powell and Rehnquist not having assumed the bench at the time of oral argument) and the decision of this Court to which this Petition for Rehearing is directed was rendered by a single vote majority (four to three) of the Justices of this Court participating therein.

[2] Appendix A to brief of *amicus*, National Legal Aid and Defender Association, is a summary of state replevin laws.

effect for about as long as this Court has been deciding Constitutional questions. Surely it could appropriately remain in effect for the matter of months incident to resubmission of the cause, when the impact of the present decision will be a major disruption of the present credit structure.

The major premise of the present majority opinion seems to be that prior notice and a hearing are constitutionally required before prejudgment replevin, in order to prevent "substantively unfair and simply mistaken" repossessions, because " 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois*, _____ U.S. _____." [page 13, slip sheet opinion] The procedure this Court has now engrafted on the prejudgment replevin procedure arguably acts to deter such "wrongs." The problem with it is that the secured creditor is gravely exposed to having wrong done to him which *cannot* be undone. Without attempting to judge the frequency of misuse, confiscation or destruction of collateral by debtors, it surely can be assumed that this problem is posed to the secured creditor with no less frequency, relatively, than the problem of "substantively unfair and simply mistaken" repossession is to the secured debtor. The difference is that the wrong cannot be undone, for most practical purposes, when the secured creditor is treated in a substantively unfair way.

While this case arose from the typical consumer credit transaction, the import of the present majority's opinion is not limited to consumer transactions. Indeed, reference is often made to the differences in form which hearings may take in different situations; but there is little doubt left that a hearing of some sort is necessary regardless of the economic setting leading to replevy by a secured credi-

tor[3]. The prejudgment replevin statutes now require indemnity bond to be posted before issuance of a writ; but the procedure imposed by the present majority opinion makes *no provision for protection of the recognized property interest of the creditor pending the preliminary hearing now required.* Under the statutes, the possibility for abuse of the remedy was recognized and appropriate requirements made; but the creditor (in the wholesale and retail markets) is now virtually helpless to preserve his collateral from destruction, removal, abuse, or other "substantively unfair" disposition. Instead, he must give notice that he intends to repossess, and must give the debtor time to do what he will about it. The length of time between notice and hearing will not be in control of the creditor, he will be embroiled in a court docket which will have to deal with this substantial additional calendar. While there may be a fairly high frequency of "no-shows" at preliminary hearings, the courts cannot predict default in advance, and thus the necessity will be to calendar all the hearings. Even allowing for a default rate, the length of time to preliminary hearings could be substantial. It is in any event a factor which is not within the control of the creditor, though creditor is now forced to bear the burden of it while debtor retains possession of the collateral.

As noted by Justice White in the present dissent (page 4, slip sheet opinion—dissent), creditors resort to repossession only in cases where no other alternative exists. Economics makes it much to the creditor's benefit "if the transaction goes forward and is completed as planned." (*Ibid.*) When repossession occurs, it is normally a salvage operation and not a profit-making one. (Affidavit of Vin-

[3]We pass, for the moment, the question of waiver, which will be discussed hereafter.

cent G. Morgan, Appendix p. 52) To the extent that the secured debtor's possessory interest in collateral is "dearly bought and protected by contract" [page 18, slip sheet opinion], the secured creditor's property interest in possession and preservation of the collateral is likewise dearly bought and protected by contract. Nothing in the majority opinion changes that fact. What is accomplished by the present decision is that, pending litigation, the debtor gets to continue using the collateral. Use of the property is not suspended, as is the practical effect of repossession under the statutes. Debtor is permitted to continue using the property.

What is the difference between debtor's use of the property during creditor's repossession efforts, and Family Finance's use of Mrs. Sniadach's wages pending their dispute? Is not the debtor put effectively in the position which this Court found constitutionally objectionable when Family Finance enjoyed it in the *Sniadach* case?[4] Can the denial of creditor's property rights under the now required procedure be characterized as *de minimis?* How, consistently with procedural due process, can the debtor's disputed rights be given precedence and dominance over the creditor's disputed rights? That is precisely what the law will be if and when the majority opinion becomes final.

It should be noted that not all repossessions occur between parties occupying economic status similar to this case between Firestone and Mrs. Fuentes. In the retail market, thousands of small businessmen have depended on the inexpensive replevin remedy in making credit extension decisions. For those businessmen, large and small, who are in exquisite need of a predictable cash flow, the vagaries of court calendars could have a profound effect.

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[4]*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

The assumption simply cannot be made that creditor's property rights are unimportant when compared with the rights of the consumer. Particularly is this so when the creditor stands to lose not only time but also the collateral. Under the present majority opinion, those who are disposed to do so can secrete, remove or destroy the collateral upon notice of the newly-required hearing. Considering the volume of automobile instalment credit, for instance, and the mobility of the collateral, the problem cannot be blinked away.

In varying degrees, the same problem applies to all portable or movable collateral. Under the now necessary procedure, the creditor has *no assurance from the debtor* either that the debt will be paid or the collateral will be forthcoming in the same condition as when replevin was sought. If the bond requirement is a "minimal deterrent" to misuse of the replevin remedy [page 15, slip sheet opinion], what deterrent at all exists in the case of a debtor who knows that his property will be repossessed as soon as a hearing is held? None—the plain fact is that under the present majority opinion the creditor is without practical remedy against the debtor who would act in a "substantively unfair" manner. The present decision will necessarily have the effect of encouraging purchasers to ignore contract obligations. In cases involving smaller purchases, the increased cost of repossession will make it economically impractical to enforce creditor's rights.

The inevitable effect of the additional hearing requirement engrafted by the present majority opinion on the replevin process will be the restriction or denial of credit to poor people—the very group with which the majority opinion is apparently most concerned. The cost of doing business will continue to dictate the nature of credit risks

businesses will take; and the increased cost of taking credit risks must necessarily result in restriction of credit extension to marginal credit applicants—poor people. In view of the dearth of evidence in the record that the remedy as presently applied operates to cause some injustice,[5] the comparative property rights of parties to a secured transaction appear to be properly balanced under the present system. Despite the present majority's statements implying that due process has always required notice and hearing before civil pre-judgment attachments, the recognized state of the law now and in the time of Mr. Justice Holmes has been:

> . . . nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect on the result of the suit. *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 31 (1928).

Judging the nature and reasonable effect of any change in the replevin procedure is properly a legislative function. On this record, the wholesale amendment of the replevin procedure is indeed "ideological tinkering with state law" [page 6, slip sheet opinion—dissent] which will inure to the detriment of the secured credit segment of our economy, both debtors and creditors. The one group of people who will be most dramatically injured is the marginal credit risk group—poor people.

The effect of the present majority's opinion on the wholesale secured transaction is also difficult to judge—but

[5]There can be little doubt that, after preliminary hearings, Firestone will be ordered entitled to the chattels in question. With the exception of Rosa Washington in Parham, which involves an unconventional application of the remedy, it appears that the debtor — creditor law has been appropriately effectuated in all present cases, despite replevy without prior hearing.

distressing to contemplate. Under the law of UCC states, which encompasses almost all jurisdictions, secured inventory passes unemcumbered into the hands of retail purchasers despite the inventory lien. [Article 9 U.C.C. §9-307] A substantial portion of all inventory held for retail sale is held on inventory financing agreements which are remedied, when in default, by the replevin remedy. Each such transaction involves, by definition, volume which is many times in excess of ordinary retail transactions. The impact to both creditor and debtor of a defaulted secured wholesale transaction is likewise of greater importance to both parties because of the increased liabilities involved. When such a transaction goes "bad", and repossession becomes necessary, time is literally of the essence. Regardless of the perfunctory form of a pre-writ hearing, the delay incident to holding it would be an unconscionable advantage to a debtor and an unconscionable imposition on a creditor who has precious little time to enforce a security interest. If debtor is "substantively unfair" to creditor in this context, creditor has no practical remedy. Here, even more than in the retail transaction, the creditor has absolutely no interest in institution of replevin proceedings if there is any hope of completing the transaction as contemplated; and the size of the replevin bond is itself a relatively greater deterrent to filing suit in questionable cases. Here, the time factor involved is of greater significance. "Ideological tinkering" translates into unfair advantage, which creditor may be helpless to combat, and the economic effect of which can be severe.

On the matter of waiver of notice and hearing, the present majority opinion proceeds from an unsubstantiated and unwarranted assumption that people don't understand when they buy on time that the purchases will be repossessed if payments are not made. There are undoubtedly

things about financial transactions that are not commonly understood, but to reason that the contract waiver was not understood because it was not explained, [and because it did not recite that repossession would occur by statutory replevin, meaning prejudgment replevin without prior notice and hearing], is to rely on a naivete which common sense alone should reject. Mrs. Fuentes may not have known that it would be called a replevin writ, but it is respectfully suggested that virtually everyone to whom credit is extended knows that repossessions occur for non-payment of the purchase price. Nothing could proceed more logically from the fact that possession was conferred before payment, than that possession is surrendered upon non-payment. The waiver problem posed by the present majority opinion is made almost insurmountable in the retail market by reference to the *Overmyer*[6] criteria, found necessary in cases involving a waiver of *all* notice, *any* hearing, and *any* right to be heard.

Having referred to factors such as bargaining power, printed contract forms, and conditions of sale, the majority opinion has imposed waiver problems on the major retailers which may be impossible to overcome. Indeed, retailers such as Firestone may have no choice but to restrict credit to poor purchasers. There seems to be no way that Firestone could secure a knowing, "voluntary" waiver from someone like Mrs. Fuentes, and there is no point in extending credit to people who are poor credit risks when the repossession remedy is crippled in a way which removes

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[6]*D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), argued the same day as this case, involved a *cognovit* provision, the effect of which was to waive all notice and right to be heard prior to entry of judgment. In the replevin process, prejudgment replevy in Florida is followed by a trial on the merits of the right to possession. Debtor is given notice of the right to appear and to contest possession at the time the prejudgment writ is served.

any profit possibilities from high volume, high risk credit transactions.

In addition to these reasons for rehearing before the entire Court, there are reasons presented by the legal basis for the present majority opinion.

> . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. Federal Communications Com. v. WJR Goodwill Station, Inc. 337 US 265, 275, 276, 93 L ed 1353, 1360, 69 S. Ct. 1097; Hannah v. Larche, 363 US 420, 442, 4 L ed 2d 1307, 1320, 1321, 80 S. Ct. 1502; Hagar v. Reclamation Dist. 111 US 701, 708, 709, 28 L ed 569, 572, 4 S. Ct. 663. '"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions . . .' Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 162, 163, 95 L ed 817, 849, 71 S. Ct. 624.
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> As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. (concurring opinion)

Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961)

The "flexibility" of procedural due process requirements, with consideration for either the governmental functions involved or for the private interest affected, was recognized even in the decisions upon which the present majority principally has relied.[7] This Court emphasized in *Sniadach* that it was dealing "with wages—a specialized type of property presenting distinct problems in our economic system" (395 U.S. at 340) and concluded that prejudgment garnishment under the Wisconsin statutes might, as a practical matter, "drive a wage-earning family to the wall." (395 U.S. at 341, 342) The same peculiar circumstances were deemed conclusive, and a prior hearing was required before termination of welfare benefits in *Goldberg*. This Court emphasized the "one overpowering fact which controls" (397 U.S. at 261), was the " 'brutal need' . . . [for] the very means by which to live." (397 U.S. at 261, 264).[8] Recognition by the Court in *Burson* that "continued possession [of driver's licenses] may become essential in the pursuit of a livelihood" (402 U.S. at 539) was particularly applicable to the Georgia clergyman "whose ministry require[d] him to travel by car to cover three rural Georgia communities." (402 U.S. at 537).[9]

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[7] *Sniadach v. Family Finance Corp.* 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971); see also *Stanley v. Illinois*, ——— U. S. ——— (1972).

[8] This Court quoted with approval in *Goldberg* its prior recognition, above quoted, in *McElroy* that procedural due process requirements are dependent upon the particular circumstances, with consideration of both the governmental function and the private interest involved.

[9] Again, in *Burson*, this Court recognized:

"A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case."

(402 U.S. at 540)

Yet, the present majority concluded that those decisions "were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life"[10] and has now concluded, contrary to previous decisions, that a prior judicial hearing must be conducted before a temporary termination of a *conditional* possessory interest in *any type* of chattel, regardless of the circumstances. Nothing in this Court's past decisions imposes a pre-replevy hearing requirement to satisfy procedural due process. To the contrary, this Court stated in *Ewing v. Mytinger & Casselberry*, 399 U.S. U.S. 594, 599:

> "*It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.* Phillips v. Commissioner, 283 U.S. 589, 596, 597, 75 L. Ed. 1289, 1296, 1297, 51 S. Ct. 608; Bowles v. Willingham, 321 U.S. 503, 520, 88 L. Ed. 892, 906, 64 S. Ct. 641; Yakus v. United States, 321 U.S. 414, 442, 443, 88 L. Ed. 834, 859, 64 S. Ct. 660."

The Court may wish to recede from its opinions in prior cases involving pre-judgment attachment; but to treat them as the logical precedent to the present majority opinion serves only to confuse the law. For instance, the majority notes that pre-judgment attachment without prior hearing was approved in *Ownbey v. Morgan*, 256 U.S. 94 (1921), because attachment was "necessary to secure jurisdiction in state court—clearly a most basic and important public interest." (page 23, slip sheet opinion, n.23) *Ownbey* approved seizure of property of a non-resident

[10]p. 20 of the majority opinion of this Court.

under a Delaware statute which afforded the non-resident opportunity to appear and defend only in the event of giving security for discharge of the seized property. Contention was made that the procedure denied due process because *no defense could be raised* without posting "forthcoming" security, and the non-resident claimed inability to post security because his only property was already under attachment. Thus, non-resident lost by statutory default. The present majority apparently approves this procedure, since it involves jurisdiction. We are unable to reconcile this holding with *Boddie v. Connecticut*, 401 U.S. 371 (1971), invalidating a filing fee requirement as condition to divorce action. There the requirement of paying filing fees was held invalid as denying due process to poor persons who wanted divorces. The issue was access to the courts, the same issue presented by *Ownbey*.

It is respectfully submitted that the two decisions cannot be reconciled, and that the present majority decision cannot be reconciled with prior decisions which have always approved the use of prejudgment attachments, except in the *Sniadach* instance. By reference to the opinion under appeal in *McKay v. McInnes*, 279 U.S. 820 (1928), it is perfectly clear what that case holds. It holds that pre-judgment attachments without prior notice and hearing are constitutionally permissible. Yet, the present majority appears to distinguish that case on the basis that it wasn't an opinion case. It is clear beyond all doubt what the issues were,[11] and what the decision of them was by this Court.

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[11]McInnes v. McKay, 141 Atl. 699 (Me. 1928). The Maine Court stated:

". . . although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet

It is therefore respectfully urged that this cause be re-submitted to the Court, now consisting of nine Justices, and that rehearing of the cause occur. A case of this importance, if it is to be decided by a one-vote majority, should be decided by a majority of the entire Court. The potential for a different result herein if the cause be submitted to the entire Court, and the potential for conflicting results when analogous cases are later presented to the entire Court, are sufficient reasons to order rehearing. In addition, however, the present majority recognizes but fails to deal with the property interest of creditors in secured chattels. The Constitution does not say that due process shall be afforded only to debtors, or only to poor people. It says that all property interests are to be protected. The present majority has gone to great lengths to protect the temporary possessory interest of debtors in secured chattels, but no attention has been paid to the property rights of the other party to the transaction. The procedure required by the present majority opinion denies due process of law to creditors.

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conditional and temporary as it is, and part of the legal remedy and procedure by which the property of the debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is a deprivation without due process of law for it is a part of a process which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 141 Atl. at 702-03.

Certificate of Good Faith

The undersigned counsel for Appellee, The Firestone Tire and Rubber Co., being members of the bar of this Court, do hereby certify that this petition for rehearing is submitted in good faith and not for purposes of delay.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that on this ____ day of July, 1972, service of three copies of the printed Petition For Rehearing of Appellee, The Firestone Tire and Rubber Company, was duly made upon the following depositing same in a United States mail depository, with first class (or air mail as to those residing more than five hundred miles from Miami, Dade County, Florida) postage prepaid: BRUCE S. ROGOW, ESQ., DONALD C. PETERS, ESQ., RENE V. MURAI, ESQ., Legal Services of Greater Miami, Inc., 622 N. W. 62nd Street, Miami, Florida 33150; and C. MICHAEL ABBOTT, ESQ., 2837 Pittsfield Boulevard, Ann Arbor, Michigan, Attorneys for Appellant; DANIEL S. DEARING, ESQ., Office of the Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, Robert L. Shevin, Attorney General of the State of Florida; ALLAN ASHMAN, ESQ., R. PATRICK MAXWELL, ESQ., 1155 East 60th Street, Chicago, Illinois 60637, Attorneys for Amicus Curiae, National Legal Aid and Defender Association; THOMAS L. EOVALDI, ESQ., Professor of Law, Northwestern University, School of Law, Chicago, Illinois, Of Counsel for Amicus Curiae, National Legal Aid and Defender Association; JEAN CAMPER CAHN, ESQ., BARBARA B. GREGG, ESQ., 1145 19th Street, N.W., Suite 509, Washington, D.C. 20036, Attorneys for Amicus Curiae, Urban Law Institute of the National Law Center of George Washington University; BLAIR C. SHICK, ESQ., MARK BUDNITZ, ESQ., DONALD FOSTER, ESQ., RICHARD A. HESSE, ESQ., 38 Commonwealth Avenue, Brighton, Massachusetts 02135, Attorneys for Amicus Curiae, National Consumer Law Center of Boston College Law School; HARRY N.

(Certificate of Service Continued on Next Page)

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